NO. 20218

IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

TACOMA GRAVEL AND SUPPLY CO.,
INC., ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEES

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INDEX

CITATIONS

Cases:

Statutes and Regulations:

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COUNTERSTATEMENT OF THE CASE

1. Proceedings Below:

In 1952 the Reconstruction Finance Corporation, appellant's predecessor, brought an action in a Superior Court of the State of Washington to foreclose a chattel mortgage on all of the trucks, tractors, power shovels, rollers, mashers, generator sets, crushing plants, automotive equipment, and other machinery, equipment, fixtures, furniture and personal property of the

business of Tacoma Gravel and Supply Co., Inc. (R.4-19, 23-29, 19). The Judgment and Decree of Foreclosure entered in that action provided for sale of all of the aforementioned items and further provided for a deficiency judgment against the mortgagor and appellees, as guarantors of the note secured by the said chattel mortgage, in the event the proceeds from the sale were insufficient to satisfy in full plaintiff's judgment entered therein. (R.15-16). Thereafter, all of the said furniture, fixtures, machinery and equipment were sold in the manner provided by Washington State statutes and a deficiency resulted. (R.2). Ten years later the appellant brought this action seeking to renew the deficiency judgment. (R.1-3). On motion of appellees the District Court granted Summary Judgment in their favor. (R.48).

2. Question Involved:

The question involved on this appeal is as follows:

> Ten years after obtaining a Washington State judgment, is there anything left to renew?

That question, in turn, involves another question as follows:

> Is RCW 4.56.210 (setting forth the qualities of a Washington State Judgment) a statute of limitations?

SUMMARY OF ARGUMENT

The Reconstruction Finance Corporation voluntarily elected to bring its mortgage foreclosure action in a Washington State court and freely chose to pursue the particular remedies provided by Washington State law in such

a proceeding. In so doing, it received what is authorized by Washington State law in the way of a deficiency judgment.

RCW 61.12.160 authorizes a deficiency judgment to be entered under certain circumstances in an action involving foreclosure of a chattel mortgage. RCW 4.56.210 sets forth the qualities of such a judgment. The latter statute, and all of the cases construing it, indicate quite clearly that it is not a statute of limitations. Rather, it provides that a Washington State judgment is deemed paid and discharged after six years. It differs essentially from a statute of limitations in that it does not limit a remedy but qualifies a right. According to that statute, the judgment does not simply lose its vitality and become dormant, it is nonexistent. There is simply nothing left to renew at the end of six years.

ARGUMENT

RCW 4.56.210 IS NOT A STATUTE OF LIMITATIONS.

This case is one in which the Reconstruction Finance Corporation voluntarily chose to seek a state remedy in state court. It is, therefore, essentially different from the type of case in which a state attempts to reach out and cut off, abrogate, or in any way limit a claim of the federal government. That certainly cannot be done, as is clear from the case of United States v. Summerlin, 310 U.S. 414, cited by appellant. In the Summerlin case, the United States Supreme Court said that the State of Florida could

not force the federal government to file its claim in a probate proceeding within a period of eight months on pain of totally losing that claim. There the government simply had a claim and had done nothing to enforce it. In our case, the Reconstruction Finance Corporation voluntarily elected to bring an action to foreclose a chattel mortgage on all of the furniture, fixtures, machinery and equipment of the mortgagor pursuant to State law and in State court.

The procedure in foreclosing a mortgage in the State of Washington is set forth in RCW 61.12. Of great importance to ordinary litigants is RCW 61.12.060 which provides for an upset price upon foreclosure sale in order to insure that the fair value of the chattels is applied to the mortgage indebtedness. The statute provides that: "If the fair value as found by the court, when applied to the mortgage debt, discharges it, no deficiency judgment shall be granted." However, RCW 61.12.061 specifically provides that the United States is exempted from that requirement. In other words, the Tacoma Gravel and Supply Co., Inc., and appellees as guarantors, had no statutory opportunity to insure that the fair value of the chattels sold would be obtained. This, of course, is one of the advantages the government obtained by virtue of Washington State law.

Also of great significance is RCW 61.12.160 which provides for a deficiency judgment. Once again, this is an advantage obtained by virtue of Washington State law since many states, such as Oregon and California, have gone far in prohibiting deficiency judgments in mortgage foreclosures.

Oregon Revised Statutes 88.070 and West's California Ann. Code Civ. Proc. §580B.

The Reconstruction Finance Corporation having obtained a deficiency judgment on its own request and by virtue of Washington State law, the characteristics or qualities of that judgment are of course controlled by Washington State law. In that regard, the attributes of a Washington State judgment are set forth in RCW 4.56.210 as follows:

> "After the expiration of six years from the date of the entry of any judgment heretofore or hereafter rendered in this State, it shall cease to be a lien or charge against the estate or person of the judgment debtor, and no suit, action or other proceedings shall ever be had on any judgment rendered in this State by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment."

In interpreting the above statute, the decisions of the Washington State Supreme Court are controlling. In re Levinson, 5 F.2d 75 (D.C. Wash. 1925). Referring to those decisions, the first and most obvious fact to note is that the Washington judgment law, quoted above, is unique. Roche v. McDonald, 136 Wash. 322, 331, 239 Pac. 1015 (1925). IT IS NOT A STATUTE OF LIMITATIONS. Bettman v. Cowley, 19 Wash. 207, 53 Pac. 53 (1898); Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216 (1900); Ball v. Bussell, 119 Wash. 206, 205 Pac. 423 (1922); Roche v. McDonald, supra; In re Levinson, supra; Hutton v. State, 25 Wn. 2d 402, 171 P.2d 248 (1946). Rather, it provides that after six years the judgment is an absolute nullity. Roche v. McDonald, supra.

In Palmer v. Laberee, supra, the court, in holding that the Washington

statute was not a statute of limitations, said:

> "It (the statute) does not deal with the remedy to enforce an obligation, but with the obligation itself; declaring that upon the expiration of a certain period it shall cease to exist. Observe in limitation statutes the universal language. In all the provision is that 'actions can only be commenced' or that 'actions must be commenced' within a certain period. But the commencement of actions is not referred to in this statute. It goes directly to the obligation itself, and destroys it."

The court further said:

> "To say that a judgment shall not be a charge against the estate or person of the debtor destroys the obligation."

Recognizing the above statement as the clearly established law of the State of Washington, the local Federal District Court (W.D. Washington, N.D.), over forty years ago in the case of In re Levinson, supra, said:

> "This statute not only withholds a remedy, but satisfies or destroys the demand as fully as by payment. This statute became a part of the judgment as fully as if set out therein."

Judge Neterer went on to say:

> "This statute having been so construed by the highest court of the state . . . such holding is binding on this court."

Again, in Hutton v. State, supra, the court had occasion to consider the effect of the statute upon a judgment of the sovereign State of Washington. In its argument the State had cited another Washington statute (RCW 4.16.160) which provides:

> "There shall be no limitation to actions brought in the name or for the benefit of the State, and no claim of right predicted upon the lapse of time shall ever be asserted against the State."

In answer, the court said that RCW 4.56.210 was not a statute of limitations

and therefore RCW 4.16.160 and its codification of governmental immunity did not apply. As one of its authorities, the court cited United States v. Harpootlian, 24 F.2d 646. The latter case involved a suit by the federal government. In deciding that the federal government no longer had a judgment lien under the law of the State of New York, the court said that the statute involved was not a statute of limitations and therefore the doctrine of governmental immunity did not apply.

Since, as appellant has pointed out, the "same principle is applicable to all governments alike," if RCW 4.56.210 is not a statute of limitations as to the sovereign State of Washington, it is not a statute of limitations as to the United States.

Finally, in the case of Bettman v. Cowley, supra, the court was concerned with an action on a judgment obtained more than six years prior to 1897, the year the Washington legislature adopted the statute in question. Plaintiff argued that the statute was unconstitutional insofar as it applied to judgments in existence when it was passed because it impaired the obligation of contract, a judgment being viewed as a contract. He said that it did more than retard the enforcement of such a contract. It completely did away with the obligation. In sustaining the plaintiff, the court said that the statute was not a statute of limitations:

> "It is the contention of the respondent, however, and, indeed, that is his main contention, that this act of the legislature is a statute of limitation in effect, and numerous cases are cited where statutes of limitation have been sustained, but we think there is a vast difference between the act in question here and the acts which were construed in the cases cited by respondent."

Continuing, the court said:

> "The governing principle in this case is altogether different from the principle underlying statutes of limitation. Statutes of limitation are statutes of repose, intended to put at rest controverted questions of fact, to insure to a degree certainty in testimony by compelling its production before it is affected by the infirmities of memory, thereby giving value to contracts. Such statutes are in the interests of morals, serving to prevent perjuries, frauds and mistakes; hence they subserve public interests, and fall within the special authority of the legislature, which in the exercise of its discretion can regulate them, providing always that, where a statute of limitation is shortened, a reasonable time must be allowed to commence the action or present the claim. This constitutes no deprivation of a substantial right. It does not even change the remedy. It is a mere change in the time at which the remedy is to be applied, which can go no further than a possible inconvenience, and it is upon this theory that the shortening of the statutes of limitation are sustained. The creditor's rights are in no wise impaired. He is deprived of no remedy. His substantial right, viz. to collect his debt, remains. It is true he must reduce his claim to a judgment sooner than he was required to do, but when it is so reduced he can perpetuate his judgment, and the time for collecting the fruits of the judgment is not shortened. In this case, when the original judgment was obtained, the creditor had a right to perpetuate his judgment either by a suit on the same, or by keeping it alive under the provisions which the law under consideration repeals, and the shortening of the time in which he could bring his action, as we have seen, in no wise rendered his judgment less valuable; for, notwithstanding the shortening of the statute of limitations, there was no shortening of the life of the liability. If the creditor or claimant does not obey the law when a reasonable time is given him in which to act, his loss is attributable to his own laches and not to matters which are beyond his power to control."

Finally, the court said:

> "But altogether another principle is involved in the shortening of the life or of the actual demolition of the liability. If the debtor happens to be execution proof just at this time the creditor is helpless. No amount of diligence or industry will avail him. His judgment, which, before the passage of the law, had at least a prospective value, is now rendered absolutely value-

less, and the future acquisitions which he had a right to rely upon he is now deprived of."

To support its position, appellant simply asserts repeatedly that the Washington statute is a statute of limitations. However, repeated assertions do not constitute law. Also, appellant has cited cases from other jurisdictions dealing with unrelated statutes. These cases are: Custer v. McCutcheon, 283 U.S. 514, Smith v. United States, 143 F.2d 228 (C.A. 9) certiorari denied, 323 U.S. 729, and United States v. Jenkins, 141 F. Supp. 499, (S.D. Ga.), affirmed, 238 F.2d 84 (C.A. 5) appeal dismissed 352 U.S. 1029.

In the case of Custer v. McCutcheon, supra, an Idaho statute was involved. That statute was clearly one of limitations. The case therefore, is completely inapplicable.

In Smith v. United States, supra, the government had obtained a judgment in a foreign state and then attempted to sue on that judgment in the State of Washington. Once again, a Washington State judgment was not involved.

Finally, in the case of United States v. Jenkins, supra, the United States brought an action to enforce a judgment which had previously been obtained in a federal court in California. Once again, a Washington State judgment was not involved.

CONCLUSION

The Washington State statute involved is not a statute of limitations,

as is abundantly clear from the authorities cited above. For that reason, the judgment of the District Court should be affirmed.

James E. O'Hern

Warren J. Daheim

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rule 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Warren J. Daheim